IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 3998 of 1995

RAMLAL & ANR
V/S
STATE & ORS

Mr. DR BHANDARI, for the appellant / petitioner

Mr. SURAJ MAL NAVIN, for the respondent
Mr. OP BOOB, AGA

Date of Order : 24.5.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

The petitioners by this petition seek to challenge the orders, Annex.3 and 4, and for restoration of mutation No.9.

The case of the petitioners, as alleged in the writ petition is, that the petitioners are khatedar tenants of the land bearing Khasra No.15, situated in village Kheda Bagoria, Tehsil Phalodi, District Jodhpur, measuring 103 bigha 10 biswa. It is alleged that an application was filed by respondents No.3 to 5, hereafter to be referred to as the respondents, under Section 232 of the Rajasthan Tenancy Act, hereafter to be referred to as the Act, and Section 82 of the Rajasthan Land Revenue Act, contending, that the land was in the name of Ganesharam, and after his death, mutation No.7 was effected in the name of Smt. Sara, his

widow, and vide mutation No.9 dated 6.4.66, the lands were mutated in the name of the petitioners, and therefore, prayer was made to make reference to the Board of Revenue, to cancel the mutation No.9, as the mutation was alleged to be violative of the provisions of Section 42 of the Act, as Ganesharam belonged to Scheduled Caste while the petitioners do not belong to Scheduled Caste or Scheduled Tribe. The respondents claimed to be the legal representatives of Ganesharam, being sons of Kesuram, who too had expired. This application was contested by the petitioners, alleging inter-alia, that it is a private dispute between the private parties, and that dispute was decided by the judgment and decree of the learned Assistant Collector, vide judgment dated 28.9.64, in a revenue suit No.59/63. Copies of the judgment and decree have been produced as Annex.1 and 2, and it is alleged, that in pursuance to this judgment, on recommendation of the Tehsildar and Sub Divisional Officer, the mutation was effected in favour of the petitioners. The Collector, however vide order dated 30.5.94 made a reference for cancellation of mutation No.9, on the ground of the mutation being in violation of Section 42. Copy of this order has been produced as Annex.3. Learned Board of Revenue in turn accepted the reference, and cancelled the mutation, though the judgment and decree of the learned Assistant Collector was not touched. The copy of the judgment of the Board of Revenue has been produced as

Annex.4, while the copy of the mutation recorded in favour of the petitioners is produced as Annex.5. It is alleged that the matter was not of judicial nature, or connected with settlement, and therefore, the reference was not competent to be entertained by the Board of Revenue. Then it is contended that the mischief under Section 42 is attracted, only in cases of transfer by way of sale, gift, or bequest, while in the present case, the mutation was consequent upon the decree of the competent Revenue Court, and therefore, it does not fall within the mischief of Section 42. Then it is contended, that mutation was effected in the year 1966, while the application for making reference is made in 1991, which is highly belated, and could not have been entertained. It is then contended, that provisions of Section 232 had been amended in the year 1981, and by that amendment, the decree was also brought within the purview of capable of being made reference, but since that provision was not retrospective, reference could not be made in the present case.

No reply has been filed on behalf of the respondents despite service.

Arguing the writ petition, learned counsel for the petitioner submitted, firstly, that since the mutation has been effected consequent upon the decree of the competent Revenue Court, and is not on account of any sale, gift, or

bequest by member of Scheduled Caste in favour of person, not being a member of Scheduled Caste, the mischief of Section 42 is not at all attracted, therefore, reference could not even be made, much less could it be accepted. The other submission made is, that since the mutation was effected consequent upon the decree of the Revenue Court dated 28.9.64, reference could not be made under Section 232, as amendment in the provision was effected in the year 1981. The third submission made is, that the mutation No.9 was sanctioned on 31.12.66, while the reference has been made on 30.5.94, which is grossly belated, and could not be made. The next submission made is, that the person affected by the mutation was not a party before the Board of Revenue, and the private respondents are just busy body, who had no locus to move the application for making reference. Still next submission made is, that since it is a private dispute between the petitioners on the one hand and the respondents on the other hand, reference could not be made.

Elaborating the arguments, learned counsel for the petitioner simply read the orders and judgments being Annex.1, 3 and 4, and simply reiterated the submissions.

On the other hand, learned counsel for the respondents relying upon a judgment of this court, in Balu Vs. Birda reported in 1983 R.R.D. 159 submitted, that it is

established law by this Court, that even if the transfer is effected consequent upon a decree of the Revenue Court, whether exparte, or on compromise, or even contested, and if that transfer violates the provisions of Section 42, then such transfer would be affected by the provisions of Section 42, and therefore, the contention of the petitioner cannot be accepted. Then regarding delay, it was submitted by learned counsel for the respondent, that in Babu Singh Vs. State of Rajasthan & Ors., reported in 1998(1) RLW (Raj.) 507, it has been held by this Court, that where a person purchases the land in contravention of the provisions of Section 42, he cannot acquire khatedari rights by adverse possession. Regarding locus, it was submitted that the respondents are not busy body; rather they are the real grandsons of Ganesharam being sons of Kesuram, while Ganesharam and Kesuram both have expired, and therefore, they are the only directly affected persons, and have been so found by the Board of Revenue in Annex.4.

In rejoinder, learned counsel for the petitioner reiterated, that in view of the judgment of Hon'ble the Supreme Court, in Shyam Sundar & Ors. Vs. Ram Kumar & Anr., reported in AIR 2001 SC 2472, and Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra & Ors., reported in AIR 1994 SC 2623, the amendment in Section 232 of the Act cannot be said to be retrospective, and therefore, reference was incompetent.

Mr. Boob, learned counsel for the State submitted, that since in the present case, the transaction is clearly violative of the provisions of Section 42, it is a fit case, where this Court would be pleased to direct the land to be resumed to the State, under Section 175 of the Act.

I have considered the submissions and have gone through the documents annexed with the writ petition.

So far as the fist contention is concerned, a look at the judgment of this Court in Balu's case would show, that therein it has clearly been held in para-18 and 19 as under:-

> "18. In my opinion, the provisions of Section 42 have been enacted for prohibiting transfer of agricultural land from Scheduled Caste to Non-Scheduled Caste on the ground that Scheduled caste and Scheduled tribe are the weaker sections of Society and if protection it not given, the other affluent members of society would exploit them. This is Socio-Economic Legislation to ameliorate the condition of down trodden, depressed and supressed segment of society, who are weaker financially, economically, socially and also in education.
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> 19. It is, therefore, necessary that broad, liberal interpretation should be made to the word, 'Transfer' used in this proviso and all direct or indirect methods of transferring property should be considered to be hit by the prohibition, contained in Section 42. In that context and background the sale or bequest would be void."

And no contrary judgments have been cited on the

side of the learned counsel for the petitioner. In that view of the matter, it has to be concluded, that even if the transfer (mutation) is brought about on account of the decree of the Revenue Court, being Annex.1, still it is hit by the mischief of Section 42.

So far capability of the decree being made subject matter of reference is concerned, the submission made was that the amendment is not retrospective. May be that there is nothing in the language to show, as to whether it is prospective or retrospective, but then that aspect need not detain me for the simple reason that admittedly, the application for reference has been made much after the amendment of Section 232, and there is no warrant for concluding on the face of the language of Section 232 that a reference there-under could not be made with respect to any decrees passed before the commencement of the amendment. So far as the judgment of Hon'ble the Supreme Court in Shyam Sundar's case is concerned, that has no bearing on the present controversy, inasmuch as, in that case, the provisions of Section 15 of the Punjab Preemption Act were amended, and the amendment effected was that the right of preemption vesting in the co-sharer qua tenant was taken away. In that case, the suit for preemption was decreed and during pendency of the appeal, the amendment was effected. It was considered that right to get the property in preemption is inchoate right upto the date of

the adjudication of the suit, but it does become effective as soon as decree is passed, and in a preemption case where an appeal is filed against the decree of the trial Court, the scope of appeal is confined to the question, as to whether the decision of the trial Court is correct or not. It was further held that the loss of qualification of preemptor or vendee acquiring status above the preemptor, during pendency of appeal, cannot be allowed to influence the Court, as the Court of appeal is mainly concerned with the correctness of the judgment rendered by the trial Court. In that background, it was held, that since the amendment affects substantive rights of the parties, and there is nothing to show, either expressly or by necessary intendment, that the provision was intended to be retrospective, it was held to be prospective, so as not to apply to that pending litigation. Then so far as the judgment in Hitendra Vishnu Thakur's case is concerned, a look at para-25 thereof shows, that therein Hon'ble the Supreme Court has culled out the principles regarding ambit and scope of Amending Act, and its retrospective operation, and it has been held, that law relating to forum and limitation is procedural in nature, and obviously the procedural laws are presumed to be retrospective. In view of the above, in my view, this contention also does not hold good.

Then so far as the contention about the

respondents being not effected party is concerned, it has not been shown on the side of the petitioners that before the Collector, they joined any controversy on this aspect, rather, as appears from the recitals in Annex.3, that an objection was filed only to the effect, that where there is dispute between the private parties, the government cannot make reference, and the aggrieved party is required to be left to seek remedies in law. Then even before the Board of Revenue also, it does not appear, that any controversy was raised in this regard, inasmuch as, from para-5 of Annex.4 it clearly appears that, the only submission made was, that the mutation has been sanctioned pursuant to the judgment of the SDO, wherein the present petitioners have been declared to be Khatedar, and therefore, the mutation effected consequent upon a decree cannot be cancelled. In that view of the matter, it cannot be said that the respondents are busy body, and on the principles of non-traverse, the finding of the Board of Revenue, directing the land to be recorded in the name of the respondents as the heirs of Ganesharam, cannot be said to require any interference on the ground of locus-standi of the respondents.

Then I take up the contention about the delay in applying for reference, and the contention about it being a private dispute. It has been held in Babu Singh's case, by this Court, that khatedari rights cannot be acquired by

adverse possession, where the transaction is hit by Section 42. In that case, the khatedar belonging to Meghwal community had sold the land to one Naresh Chandra in 1963, who in turn sold to Babu Singh on 24.5.70, and since then the purchaser was in possession, then proceedings were initiated under Section 175, and in separate proceedings, in revenue campaign, the original khatedar made application to the Assistant Collector for restoration of possession to her, and the Collector restored the possession. This action was challenged, inter-alia on the ground, that by adverse possession, the khatedari rights were acquired by the transferee, and that contention was negatived. Here also, in substance, the ground of delay is taken, to comprehend that by passage of time the rights were crystallised in favour of the purchaser, the petitioner. Then apart from this judgment, in my view, the controversy stands sufficiently answered by the judgment of Hon'ble the Supreme Court, in Amrendra Pratap Singh Vs. Tej Bahadur Prajapati, reported in AIR 2004 SC 3782, wherein the provisions of Transfer of Immovable Property (By Scheduled Tribes) Regulations, which were applicable to scheduled areas, prohibited, transfer of immovable property by member of aboriginal tribes, in favour of a person not belonging to any aboriginal tribe was prohibited, and in that case, the transferee remained in possession of the property for more than 12 years. The contention was raised to the effect that by being in possession for 12 years, he has perfected

title by adverse possession, resulting into extinguishing the title of the transferor, and vesting it in the transferee, it was held that, in such matters, the State being custodian and trustee of the immovable property of Tribal, is competent to move non-tribal in possession, and the provisions of Article 65 were held to be irrelevant. It was considered, that the regulation authorised the steps to be taken by the tribal, or by any person interested therein, or even suo motu by the competent authority, and in that provision, contained in para-3, the limitation was prohibited. Likewise, the provisions of Section 27 of the Limitation Act were also held to be not attracted, as non-tribal was prohibited to acquire title over the property belonging to the tribal, and it was held, that general law of limitation cannot defeat the provisions of the special law. In my view, that being the position, admittedly, when the original khatedar was a member of Scheduled Caste, while the petitioners do not belong to Scheduled Caste, the transaction is clearly prohibited by the clear provisions of Section 42, and is declared to be void, and therefore, the mere delay cannot be projected as a defense to seek upholding the mutation, and therefore, in view of the philosophy laid down by Hon'ble the Supreme Court in Amrendra Pratap Singh's case, it cannot be said, that the dispute in the present case is a mere private dispute, and therefore, this contention also cannot be accepted.

Thus, the contentions raised by the petitioners have no force.

Then I take up the submission made by Shri Boob. It has been found by the Board of Revenue, and in the above conclusions, that the resultant position of the entire episode is, that there has been a transfer of the land belonging to Scheduled Caste, in favour of person, who does not so belong to Scheduled Caste, and since the petitioners claimed to be in possession, in my view, the provisions of Section 175 of the Act are clearly attracted. Obviously in view of the judgment of Hon'ble the Supreme Court in Amrendra Pratap Singh's case, the provisions of Limitation Act are also not attracted, and the present case is prima-facie clearly appears to be covered by the provisions of sub-section (4-A) of Section 175. In that view of the matter, before concluding the judgment, I think it appropriate to direct the State Government, and the Tehsildar, Phalodi, to immediately move appropriate application under Section 175 of the Act, before the authority competent, and the authority competent is further directed to decide that application on merits in accordance with law, specially keeping in view the provisions of Section 175 (4-A) of the Rajasthan Tenancy Act.

The writ petition is, therefore, dismissed with the aforesaid direction to initiate proceedings u/s.175 of the Rajasthan Tenancy Act immediately.

The parties are left to bear their own costs.

(N P GUPTA),J.

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